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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 1182

JOSEPHINE M. MOSS, Administratrix of the Estate of Nicholas John Moss, Deceased,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAY IT PLEASE THE COURT:

STATEMENT OF THE MATTER INVOLVED.

Petitioner recovered a $7,500.00 jury verdict and judgment against respondent in the District Court for the Northern District of Indiana, for the death of her husband in a railroad crossing accident in Indiana.

The Circuit Court of Appeals reversed on the ground that, though defendant was guilty of negligence, the decedent was guilty of contributory negligence as a matter of law.

It was a 2 to 1 decision, with Judge Evans writing the majority opinion (R. 260), and a dissenting opinion by Chief Judge Kerner, who argues for affirmance. (R. 267.) The decision, not yet officially reported to our knowledge, is reported in *Moss* v. *Pennsylvania P. Co.*, 146 F. (2d) 673, but the advance sheet erroneously cites the date the rehearing was denied as January 26, when it was February 6. (R. 272.)

BASIS OF THIS COURT'S JURISDICTION.

Jurisdiction is based on Section 8 of the Act of February 13, 1925, 43 Stat. 936, 940, 28 U. S. C. A. 350.

The judgment of reversal was entered on January 3, 1945 (R. 271), after which petitioner duly filed a petition for rehearing on January 18, 1945 (R. 271), which was answered by respondent (R. 271), and considered by the court, after which the court entered an order denying the petition on February 6, 1945. (R. 272.) This petition is being filed within three months after the judgment, deducting the period between January 18 and February 6, during which the time for this petition was suspended by the petition for rehearing, in accordance with this court's construction of the Act of February 13, 1925, in *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498, 48 S. Ct. 112, 72 L. Ed. 393.

THE QUESTIONS PRESENTED.

1. Does this decision deprive petitioner of a jury trial?

2. Does this decision conflict with applicable decisions of the Indiana Supreme Court?

REASONS FOR ALLOWANCE OF WRIT.

1. This decision deprives petitioner of a jury trial, because:

(a) The court arbitrarily substitutes its own inference in place of the jury's as to whether decedent used ordinary care under the complex circumstances of speed, distances and visual obstruction at the time of the collision. This conflicts with the rule recently announced by this court in reversing similar cases from the Seventh Circuit:

Tennant v. *Peoria and P. U. Ry. Co.* (1944), 321 U. S. 29, 35, 64 S. Ct. 409, 412.

Pokora v. *Wabash Ry. Co.* (1934), 292 U. S. 98, 101, 105, 54 S. Ct. 580, 581, 583, 78 L. Ed. 1149.

NOTE: Jury trial in this case is guaranteed by *Article I, Sec. 20, of the Indiana Constitution,* in addition to the guaranty in the Federal Constitution.

(b) This error is aggravated by the fact that the court, in arguing its own fact inference against the jury's, prints in its majority opinion two of defendant's photographs, which most effectively argue defendant's contention that the view was not obstructed (R. 262), but ignores two of plaintiff's photographs which forcefully sustain the jury's inference that the view was obstructed. (Plaintiff's Exhibits 3 and 6, printed at R. 203 and 209, offered in evidence at R. 21-22 and at R. 77-79.)

2. This decision conflicts with applicable decisions of the Indiana Supreme Court, which control the question

of contributory negligence in this railroad crossing accident which occurred in Indiana, namely:

(a) The majority opinion holds that "the simple fact" of a motorist driving in front of a train and getting hit, is enough to "establish contributory negligence as a matter of law" in Indiana, unless the motorist proves he was not negligent. (R. 261.) This conflicts directly with the Indiana statute which casts on the defendant the burden of proving contributory negligence, and conflicts with the Indiana Supreme Court decisions holding that "there is no presumption whatever that either party was or was not guilty of negligence."

Sec. 2-1025, Burns Ann. Sts. 1933.

Baltimore & Ohio R. Co. v. *Reyher* (1940), 216 Ind. 545, 549-555, 24 N. E. (2d) 284.

"It will not be presumed that decedent was guilty of contributory negligence merely because there was a collision between his truck and the locomotive."

Heiny v. *Pennsylvania R. Co.* (1942) 221 Ind. 367, 373, 47 N. E. (2d) 145.

(b) The majority opinion after much vacillation, rules as a matter of law that an Indiana motorist is guilty of contributory negligence when he approaches a railroad crossing at 10 or 15 miles per hour, with his view of the train obstructed until he gets within 20 or 30 feet of the track, and he gets hit by a train going 65 miles per hour through a town in violation of an ordinance (R. 260, 266). This conflicts with the decisions of the Indiana Supreme Court holding that it is for the jury to determine from such circumstances whether as an ultimate fact the motorist was

guilty of negligence, proximately contributing to his death. Recent controlling Indiana cases hold that such circumstances do not constitute contributory negligence as a matter of law:

Heiny, Admrx. v. *Pennsylvania R. Co.* (1942) 221 Ind. 367, 372-375, 47 N. E. (2d) 145. (Facts similar to those at bar. Held: for the jury.)

Pettibone v. *Howard* (1941) 218 Ind. 543, 546, 34 N. E. (2d) 12. (Photographs rank no higher than oral testimony and will be disregarded in favor of testimony most favorable to plaintiff. Page 546.)

Bartley v. *Chicago & E. I. Ry. Co.* (1939) 216 Ind. 512, 523-525, 24 N. E. (2d) 405. (Facts similar to those at bar. Held: for the jury.)

Baltimore & Ohio R. Co. v. *Reyher* (1939) 216 Ind. 545, 550-555, 24 N. E. (2d) 284. (Facts similar to case at bar. Held: where the physical facts, though undisputed, are susceptible of more than one inference, case is for jury on contributory negligence. Page 552.)

(c) *The dissenting opinion in the case at bar contains an able, concise and correct summary of the Indiana law and decisions on all questions presented in this petition* (R. 267).

The majority opinion, though admitting that Indiana law controls (R. 261), *does not cite a single Indiana decision. It ignores all the Indiana cases cited in the dissenting opinion,* and substitutes its own arbitrary dictum, based on involved and vacillating argument as to what constitutes contributory negligence under the circumstances at bar. It cites (at R. 261), *Pokora* v. *Wabash Ry. Co.*, 292 U. S. 98, which is directly against it, and *B. & O. R. R.* v. *Goodman*, 275 U. S. 66, which the Indiana courts have ex-

pressly refused to follow. See *Pennsylvania R. Co.* v. *Boyd* (1933), 98 Ind. App. 439, 444, 185 N. E. 160, 162. (Transfer denied by Indiana Supreme Court.)

3. Petitioner's object is not to obtain a review of Indiana law as such, but to protect two basic rights which she asserts were violated by the Circuit Court of Appeals and which can only be remedied by this Court:

(a) Trial by jury was denied petitioner. *This is apparent on the face of the majority opinion.* It attempts to argue counter-inferences of fact against the jury's inferences (R. 263-266). It criticises decedent for alleged violation of a statute and then abandons the charge and admits that the Indiana decisions do not support it (R. 265-266). It bases part of its reasoning on defendant's evidence of 44 feet of clear vision (R. 265), then shifts to plaintiff's evidence of 20 feet of vision (R. 266), and finally rests on the court's dictum of fact that "he should have looked" (R. 266).

A very slight look at the record behind the opinion will emphasize and verify this infringement of the jury's functions. The majority opinion prints two of defendant's photographs in its attempt to argue against the jury on the fact of visional obstruction (R. 262), while ignoring plaintiff's photograph taken by a police officer immediately after the accident, which strongly supports the jury (Plaintiff's Exhibit 3, printed at R. 203 and introduced in evidence at R. 21-22). Note the knoll and weeds back of the cross-arm which extend almost out to the track (R. 203). See also

Plaintiff's Exhibits 6 and 7 (printed at R. 209, 211, introduced at R. 77-79). See also defendant's own Exhibit 4, showing quite a high knoll obstructing vision until the traveler almost reaches the tracks (printed at R. 221, introduced at R. 125). While ignoring this last exhibit, the court chooses to print the next one, Defendant's Exhibit 5, which is a misleading and unfair representation because it cuts off the knoll (printed at R. 223, introduced at R. 74). The opinion also chooses to print Defendant's Exhibit 1, which is worthless on the point decided, because it does not show whether any obstruction existed to the right, from where the train was coming (printed at R. 215, introduced at R. 74). This highly partial and argumentative selection of the two photographs most favorable to the court's ~~interest~~ inference, out of a total of 9 introduced (R. 203-223), is important because the opinion offers these photographs as being an undisputed and fair representation of the physical facts and evidence which were laid before the jury, and the court repeatedly bases its argument on these two photographs (R. 263, top and bottom; R. 267, top), while admitting that the physical fact of obstruction thus argued from the photographs "is determinative of the case" (R. 264, middle). See also, positive testimony of plaintiff's witness (the police officer who investigated right after the accident) that it was "practically impossible" for a traveler in decedent's situation to see the approaching train (R. 20-21), he being the officer who took the only photograph made on the date of the accident, Plaintiff's Exhibit 3, *supra* (R. 21, 203). He further testified

that the first view decedent had was when he got about 20 feet from the track (R. 29).

This court will review negligence cases *for the purpose of preventing such infringement on the right of jury trial.* It recently reviewed and reversed the case of *Tennant* v. *Peoria & P. U. Ry. Co.* (C.C.A. 7), 134 F. (2d) 860, where the Circuit Court of Appeals for the Seventh Circuit had overturned a jury's verdict on a question of negligence and proximate cause. This court granted certiorari and restored the verdict, saying:

> "We granted certiorari because of important problems as to petitioner's right to a jury determination of the issue of causation."
>
> *Tennant* v. *Peoria & P. U. Ry. Co.* (1944), 321 U. S. 29.

> Note: The above case was under the Federal Employers Liability Act, but the decision is not based on the Act. It goes entirely on the question of right to jury trial.

This court also granted certiorari and reversed the case of *Pokora* v. *Wabash Ry. Co.* (C.C.A. 7), 66 F. (2d) 166, where the Circuit Court of Appeals for the Seventh Circuit had overturned a jury verdict on contributory negligence in a railroad crossing case quite like the one at bar.

> *Pokora* v. *Wabash R. R. Co.* (1934), 292 U. S. 98, 101, 105.

(b) Further, this court will protect a litigant in the District Court of Indiana against having the Circuit Court of Appeals ignore the applicable Indiana decisions and apply its own arbitrary view of the law. *Rule 38, par. 5 (b).* If Indiana law

can be ignored and violated in this manner, as the dissenting opinion demonstrates it has been, this court's decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, is nothing but a meaningless admonition to lower federal courts, to be ignored at will, and is no protection to citizens. The majority opinion, without citing a single Indiana case, or attempting to distinguish those in the dissenting opinion, *compels the District Court in the case at bar to ignore the Indiana law and to violate the rule of this court in the Tompkins case.*

In the future numerous crossing cases in the Federal District Courts in Indiana, shall those courts follow the Indiana Supreme Court as commanded in the *Tompkins* case or follow the arbitrary contrary rule announced in this majority opinion that (a) the simple fact of a traveler getting hit makes him guilty of contributory negligence as a matter of law unless he proves himself innocent (R. 261), and (2) if he has a clear view of the track for 20 feet, he is guilty of contributory negligence as a matter of law (R. 266)?

Having been advised by the Clerk that a supporting brief is optional, we believe that the reasons for granting the writ are sufficiently stated above, and in the dissenting opinion (R. 267), and therefore refrain from filing a further brief.

WHEREFORE, Petitioner prays that the writ of certiorari may issue for the review of this case.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE PENNSYLVANIA RAILROAD COMPANY, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENT.

Petitioner, Josephine M. Moss, Administratrix of the Estate of Nicholas John Moss, deceased, secured a jury verdict and judgment in the amount of $7500 in the District Court for the Northern District of Indiana, for the death of decedent in a railroad crossing accident in the State of Indiana.

This judgment was reversed by the United States Circuit Court of Appeals for the Seventh Circuit on the 3rd day of January, 1945 (146 F. 2d 673), on the ground that the decedent was guilty of contributory negligence as a matter

of law and that the lower Court should have so held. Rehearing was denied February 6, 1945.

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit was filed in this Court by plaintiff-appellee below on the 19th day of April, 1945. Copies of petition and record were served upon counsel for respondent on April 26, 1945.

SHORT STATEMENT OF FACTS.

The facts, which curiously petitioner refrained from setting forth in the petition, may be briefly summarized as follows: They will be referred to more fully, with appropriate record references, in the argument which follows. Decedent was driving his automobile in a northerly direction along the highway during daylight at about 3 o'clock in the afternoon, December 6, 1941, approaching the crossing of defendant's double track right of way, running generally in an east and west direction. The northernmost track, the last to be reached by decedent, where the accident occurred, was used for westbound traffic. The crossing was in plain sight and was protected by a large cross-arm warning sign. Decedent had ample view of trains approaching from the east, to his right, although such view was *partially* obstructed by a knoll for a distance of 95 feet up to a point about 42 feet from the track where the collision occurred. Throughout this distance of 42 feet the vision to the east was clear and completely unobstructed for at least a mile down the track. Decedent traveled the last 75 to 100 feet up to the crossing at a speed of approximately 10 to 15 miles per hour, without stopping and without appreciably increasing or decreasing his speed up to the point of collision. Defendant's train approximately 1000 feet in length approached the crossing from the east at a speed of from 60 to 70 miles per hour. While passing the knoll for the distance of 95 feet, a person riding along the highway in an automobile could see the top of an approaching train.

It was admitted below that defendant was guilty of negligence in exceeding the speed limit within the corporate limits of Schererville, Indiana, where the accident occurred, and the sole question involved below and presented here is whether or not under the foregoing undisputed facts decedent was guilty of contributory negligence as a matter of law, barring plaintiff's recovery.

QUESTION INVOLVED.

The single question here involved is whether or not under the particular facts in this case, decedent was guilty of contributory negligence as a matter of law for failing to bring his automible to a stop upon approaching the railroad crossing, when he saw, or had he looked could have seen, the approaching train in ample time to have avoided the collision.

ARGUMENT.

There is no important question of local law here involved, as the decision in this case is not controlling in other cases involving grade crossing accidents in the State of Indiana where the facts necessarily will vary in essential particulars. There is no widespread area or extensive group involved which justifies a review by this Court of the decision of the Circuit Court of Appeals. Furthermore, as hereinafter fully demonstrated, the decision of the Circuit Court of Appeals is not in conflict, but is in entire accord, with the law of Indiana as determined by statute and judicial decision.

Decision Below is Not Contrary to the Decisions of this Court.

Petitioner cites only two decisions of this Court:

Tennant v. *Peoria and P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409, and

Pokora v. *Wabash Ry. Co.*, 292 U. S. 98, 54 S. Ct. 580.

Obviously, the *Tennant* case is not authority for any principle asserted by petitioner here. That case, arising under the Federal Employers' Liability Act, involved the question of whether the jury should be permitted to infer that the failure to ring the bell of the locomotive before starting was negligence and that such negligence was the proximate cause of the employee's death. The Court simply held that it was not proper for the Appellant Court to override the jury's conclusion by adopting other inferences which might be suggested by the conflicting evidence. No question of contributory negligence was involved.

The decision in the instant case is not based upon inferences. The Court below found upon the undisputed facts that decedent was guilty of contributory negligence as a matter of law and strictly followed the law of the case as laid down by the statute and decisions of Indiana.

In the *Pokora* case, which admittedly limited the decision in the *Goodman* case (*Baltimore and Ohio R. Co.* v. *Goodman*, 275 U. S. 66, 48 S. Ct. 24), this Court held that the driver of an automobile struck by a moving train while he was crossing a series of tracks, with his view of the approaching train almost completely obscured by cars standing on adjoining tracks, could not be held guilty of contributory negligence as a matter of law. The Court pointed out that the record did not "show in a conclusive way that the train was visible to Pokora *while there was still time to stop*" and held that it "was for the jury whether reasonable caution forbade his going forward in reliance on the sense of hearing, unaided by that of sight."

In the instant case, the undisputed evidence is that throughout a distance of at least 42 feet immediately before reaching the track, decedent, had he looked, could have seen the approaching train and could have stopped almost instantly, avoiding the accident.

The Decision Below is in Complete Harmony with the Law as Settled by the State of Indiana.

The law of Indiana applicable to this case is so fully, yet concisely, set forth in a recent decision of the Appellate Court of Indiana, *Grand Trunk Western R. Co.* v. *Briggs*, 112 Ind. App. 360, 42 N. E. 2d 367, decided June 16, 1942, that further citation of authorities would hardly seem necessary. The well settled rules and principles laid down by the Indiana Court in that case will be separately stated here and applied to the undisputed facts of this case.

Before stating the particular rules, the Court makes the following general observation:

> "Certain rules and principles, relating to the duties devolving upon a person traveling on a public highway when approaching and entering upon a railroad crossing, with reference to his own safety, have become well established."

1. The first rule set down is that a railroad crossing is itself a warning of danger.

> "* * * One of these rules, long since established as the law of this state, is that railroad crossings are, in themselves, a warning of danger and all travelers approaching such crossings must exercise reasonable precaution for their own safety, and a failure to do so is a bar to recovery in the event of injury."

See also

Mann v. *The Belt Ry. Etc., Co.*, 128 Ind. 138, 143; 26 N. E. 819.
N. Y., Etc. R. Co. v. *Leopold, Admr.*, 73 Ind. App. 309, 315; 127 N. E. 298.
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N. Y. Central R. Co. v. *Casey*, 214 Ind. 464, 471; 14 N. E. 2d 714.

There can be no doubt concerning the warning which decedent had as he approached the railroad crossing which

was in plain view and protected by a large distinct warning sign, as will clearly appear from defendant's Exhibit No. 1 (R. pp. 74, 215).

2. The second rule set forth is that requiring persons to look and listen as they approach such crossings.

> "Travelers on a public highway, in attempting to pass over railroad crossings, are required to look and listen for the approach of trains." (Citing cases)

There is no testimony in this case that decedent either did or did not look and listen as he approached the crossing, but it is obvious from the evidence, as will hereinafter more clearly appear, that he did not look, for had he looked he would have seen the approaching train in ample time to have avoided the accident.

3. As to the manner in which persons approaching a crossing must look and listen for approaching trains, the Court stated the now well recognized rule that one must look and listen where it might reasonably be effective.

> "The traveler upon the highway who is about to enter upon a railroad crossing is not required in the exercise of reasonable care to look and listen at any precise point, *but he is required in the exercise of such care to look and listen for the approach of trains where such acts will be reasonably effective.*" (Citing cases) (Emphasis supplied)

See also

Cleveland, Etc. R. Co. v. *Pace*, 179 Ind. 415, 424; 101 N. E. 479

Chesapeake & Ohio R. Co. v. *Patchett*, 96 Ind. App. 220, 225-228; 184 N. E. 789

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New York, Etc. R. Co. v. *Leopold, Admr.*, 73 Ind. App. 309, 315; 127 N. E. 298.

That decedent could have seen the approaching train in mple time to have avoided the accident had he looked, we ubmit, is incontrovertible. There is not one word of tes- mony from any witness, appearing on behalf of plaintiff r defendant, or one bit of documentary evidence that roves or even infers the contrary. The undisputed evi- ence demonstrates conclusively that the decedent had full pportunity to avoid the collision had he heeded the warn- ng and looked for oncoming trains as he approached the rossing.

Most of the important information of this subject is sup- lied by *plaintiff's* witness Redar, substantiated in per- inent part by later testimony of defendant's witnesses. Redar was the Town Marshal (R. p. 43) and as such officer was his duty to investigate this and other accidents in he Town. (R. p. 45.) He personally drove over the high- ay along the course followed by decedent, approaching he crossing in a northerly direction, and made and ecorded observations at various distances from the cross- ng. He stated that for a considerable distance from the rossing, the driver of an automobile had a clear and nobstructed view of the railroad tracks to the right or ast, up to a point about 124 feet* from the crossing, at hich point the knoll running parallel along the east side f the highway, partially obstructed the view of trains oming from the east. (R. pp. 60, 61). For a distance of 5 feet, running from the point 124 feet from the crossing o a point 29 feet from the crossing, this partial obstruction revented a full view of the tracks to the east, but the top f an approaching rain was clearly visible. He had ob- erved an approaching train from such position during the ourse of his investigation of the accident. (R. pp. 56-57, 0.) At a point 29 feet from the south rail of the eastbound

* The total of 124 feet includes the 29 feet immediately south of he crossing where the vision was clear (R. pp. 60-61), plus the 95 oot strip where the view was partially blocked by the knoll (R. . 60), both of which figures were supplied by the witness.

track (nearest rail), the driver again would have a clear and unobstructed view of the tracks to the east for at least a mile. (R. pp. 60-61.) As testified by witness Smith, the distance from the south rail of the eastbound track to the south rail of the westbound track, on which the train was moving when the accident occurred, was 13 feet (R. p. 98), so that according to Redar, decedent had a clear view of the tracks to the east for at least a mile (R. pp. 60-61), throughout the last 42 feet up to the point of collision. Thus Redar's testimony, based upon actual measurement, differs by only two feet from the testimony of defendant's witnesses, who stated that such view was available for a distance of 44 feet from point of accident. Redar also admitted (R. p. 66), that the view of the tracks to the east at a point 44 feet from the south rail of the westbound track was as shown in defendant's Exhibit No. 5. (R. pp. 74, 223.)

Witnesses Murphy, Rothermel, Smith and Peifer, appearing for defendant, testified from actual measurement that for a distance of 55 feet from the south rail of the westbound track there was a clear view of 670 feet to the east, and for a distance of 44 feet from the same rail there was a clear view to the east of at least a mile. (R. pp. 118-121, 123, 102-104, 106.)

The only testimony possibly suggesting a distance of less than 42 feet within which there was a clear view to the east for at least a mile was supplied by plaintiff's witness Schinourd upon cross examination and consisted purely of a guess. He stated that he "didn't make any exact measurements" but "would say" that there would be a clear view "way down the track to the east" at a point "about 30 feet, 20 to 30 feet probably before you approached the track." (R. p. 25.) Accepting the lowest possible figure suggested of 20 feet, plus the 13 feet between the first and second tracks, you would have a space of 33 feet from the point of the accident within which decedent had a clear view to the east.

We submit that in considering the testimony in its most favorable aspect to the plaintiff, the Court was not obligated to adopt this guess of 20 feet over the accurate testimony of plaintiff's own witness, based upon actual measurements. Assuming, without for one moment admitting, that such view of the testimony was required, the lower Court was perfectly justified in holding that decedent was guilty of contributory negligence as a matter of law where he had a clear view for a total distance of 33 feet within which he could have been the train had he looked and could have stopped in time to have avoided the accident.

4. That such duty to look and listen is not relieved by the negligence of the railroad in failing to give statutory signals, or as in the instant case, exceeding the speed limit fixed by the Town through which the train was passing, the Court in the *Briggs* case went on to say:

> "Failure of a train crew to give the statutory signals of the approach of railroad trains to public highway crossings does not relieve the traveler about to cross over the railroad from the exercise of due care to discover the approach of trains." (Citing cases)

See also

Miller v. *The Terre Haute, Etc., Ry. Co.*, 144 Ind. 323, 327; 43 N. E. 257.

Wabash R. Co. v. *Tippecanoe, Etc., Trust Co.*, 178 Ind. 113; 98 N. E. 64.

Waking v. *Cincinnati, Etc., Ry. Co.*, 72 Ind. App. 401, 408; 125 N. E. 799.

The lower Court, for the purpose of its decision, assumes the negligence of the defendant because of the speed limit violation and places no weight upon the giving of signals or the lack thereof, although as pointed out in a footnote of the opinion (R. p. 260), four witnesses testified that the engine whistle was blown and two witnesses simply stated that they did not hear any whistle.

5. The next rule set down by the Court is particularly applicable to the point upon which petitioner appears to rely almost solely in her petition. The Court stated the rule as follows:

> "Another salutary and reasonable rule is that the driver of an automobile in approaching a railroad crossing of a public highway with which he is familiar, *and where the driver's view is obstructed*, is required in the exercise of reasonable care to have his car under control, and to drive at such rate of speed that the car could be stopped, by the exercise of ordinary care, wihout going upon a crossing when an approaching train is so close as to constitute an imminent danger, and in this particular case, to avoid striking the side of the locomotive." (Emphasis supplied)

See also

N. Y. C. & St. L. R. Co. v. *Miller*, 101 Ind. App. 498; 200 N. E. 78.

Waking v. *Cin. R. Co.*, 72 Ind. App. 401; 125 N. E. 799.

Morford v. *Chicago, etc., R. Co.*, 158 Ind. 494-498.

Wabash R. Co. v. *Keister*, 163 Ind. 609; 67 N. E. 521.

This is the rule referred to by the lower Court in the instant case when it stated that it preferred not to base its decision upon the Indiana Statute, hereinafter referred to, but upon the general law on the subject, stating its conclusion as follows:

> "We are, however, not placing our decision upon this statute. There seems to be uncertainty in Indiana courts as to this statute's proper construction and application. We ignore it because as we view the evidence we must reach the same conclusion without relying on it.
>
> "Ignoring this statute, it still seems to us clear that deceased should have stopped, rather than have driven on the track in front of the engine.
>
> "In reaching this conclusion we are taking the most favorable and charitable view of deceased's action,

> namely, that he did not endeavor to race with the engine, but rather that he failed to look and therefore failed to see the oncoming train. We are accepting the estimate of plaintiff's witness rather than the measurements of defendant's witnesses, solely on the theory that it is the testimony most favorable to plaintiff that can be found in the record.
>
> "He should have looked. He must be charged with the information which he would have received had he looked." (R. p. 266)

From the undisputed facts, it is clear that decedent utterly failed to exercise reasonable care and failed to keep his car under control when he drove upon the crossing in the path of the oncoming train, which, had he looked, he could have seen was "so close as to constitute an imminent danger."

6. The Court next lays down the rule to be followed in applying the Indiana statute, which we submit is decisive of the instant case, although the Court below saw fit to ignore it in favor of the less stringent general rule.

> "In fact this obligation has been increased under certain conditions by legislative enactment. It is now provided by statute that whenever any person driving a vehicle approaches a railroad grade crossing, the driver shall stop within fifty feet but not less than ten feet from the nearest track of such railroad and shall not proceed until he can do so safely, when: (c) A railroad train approaching within 1500 feet of the crossing emits a signal audible for such distance, and such train, by reason of its speed or nearness to such crossing, is an immediate hazard, or (d) An approaching train is plainly visible and is in hazardous proximity to such crossing. Section 47-2114 Burns' 1933 (Replacement Vol. 8), Section 11189-111, Baldwin's, May 1939 Supplement."

This statute required decedent to bring his car to a stop within 50 feet, but not less than 10 feet, from the track on which the train was approaching and not to proceed until

he could do so safely, when he saw, or would have seen, had he looked, when he was at least 42 feet from the crossing, that the approaching train was obviously in hazardous proximity to the crossing. Despite the fact that the lower Court chose to follow the general law as laid down by the Indiana decisions, rather than the stricter statutory rule, the statute is nevertheless declaratory of the law of the State in the circumstances of this case.

7. The duty of the Court to hold that a person approaching a railroad crossing in violation of the foregoing rules is guilty of contributory negligence *as a matter of law,* is stated by the Court as follows:

> "We recognize that as a general rule contributory negligence is a question of fact for the jury or the trial court as the case may be, and that the cases are rare where courts of appeal may declare the plaintiff guilty of contributory negligence as a matter of law, but where, as in this case, the controlling facts are without dispute, and from which but one reasonable inference may be drawn by reasonable minds then it is not only the prerogative of appellate courts, but their duty to declare the law. Viewed from this standpoint, we are of the opinion that appellee's decedent, from the evidence in this record, was guilty of contributory negligence as a matter of law."

In the instant case, we are not dealing with assumptions or mere inferences, but with undisputed facts, from which we submit only one reasonable conclusion can be drawn, as stated by the Court below, that "decedent drove his automobile out in front of an oncoming train which he must have seen had he looked," in ample time to have avoided the accident.

In a still more recent decision, *Chesapeake & O. Ry. Co.* v. *Williams,* 114 Ind. App. 160, 51 N. E. 2d 384, decided November 19, 1943, the Appellate Court of Indiana again restated the law as established in that State applicable to the present situation, as follows:

"The courts in this state are thoroughly committed to the doctrine that a railroad crossing is a known place of danger, and its presence alone is a warning of the possible approach of trains. When about to cross a railroad a traveler on the highway must use reasonable care for his own safety, and it is requisite to such care 'that he look and listen attentively both ways, and if by looking he could have seen, and if by listening he could have heard, an approaching train in time to have avoided collision, it is presumed, if such collision occurs, that he either did not look and listen or did not heed what he saw and heard, in either such events he is guilty of contributory negligence.'" (Citing *Grand Trunk Western R. Co. case* and many other cases).

* * * * * * * * *

"As was said in Cleveland, etc. R. Co. v. Van Lanigham, 1913, 52 Ind. App. 156, 164, 97 N. E. 573, 576: 'When a person before attempting to cross a railroad track does not heed the danger of his situation and fails to look and listen for an approaching train, he is guilty of negligence as a matter of law.'"

We submit that in applying this rule to the instant case, again there can be but one conclusion, that when decedent, travelling only 10 to 15 miles per hour, made no effort to stop his car for a distance of at least 42 feet from the point of collision throughout which distance he had a clear view of the track for about a mile, either he did not look or if he did look, he did not heed what he must have seen, and in either event he was guilty of contributory negligence as a matter of law.

CONCLUSION.

It is respectfully submitted that the petition and record in this case do not present a case for review by this Court. The case does not involve any important question of local law of general application and the decision of the Circuit Court of Appeals is in complete harmony with the statutory and decisional law of the State of Indiana.

Respectfully submitted,

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